

BUYING A HOME

This is a summary of some of the things that take place when you buy a home. It is not a substitute for individual legal advice. It is to your advantage to have your own lawyer when you buy a home. The other attorneys in the process are there to protect the lender and the seller, not you. Your own attorney can see that you are protected in the terms of the sale contract and can protect you against the unscrupulous practices of some mortgage lenders.

Traditionally, real estate brokers are agents of the seller. They are paid by the seller, and their first obligation is to sell the property at the highest price possible. Their deal with the seller usually provides that the higher the selling price, the more they get paid. The broker is also required to treat you fairly, and it is generally in the interest of an ethical broker to do so. But you must remember that, unless you are explicitly working with a buyer's broker, the broker works for the seller.

The buyer's broker is relatively new in the real estate field. A buyer's broker explicitly works for you as buyer. Usually a buyer's broker is still paid by the seller, by sharing in the commission of the seller's broker according to rules set by realtor's organizations and by the state regulatory board.

If you find a broker that you like and trust, it is generally in your interest to work primarily through that broker. Since any home listed with a broker is generally listed in a multiple listing service, the broker that you work with usually can show you any home that is listed with any other broker. If you decide to buy the property, the two brokers will share the commission. Many large real estate agencies have websites, and some provide open access to the Multiple Listing Service.

According to the rules which govern the practice of law, if you have your own attorney, the attorneys for the other parties should not talk with you directly, but should communicate with you only through your attorney. Lender's attorneys, for some reason, often forget to observe this rule. For your own protection, you should not talk directly with the attorneys for other parties unless your own attorney agrees.

The Offer

When you are shown a property that you like, the first document that you will be asked to sign is an "offer to purchase" form. You will also be asked to put down a sum of money to bind the offer. If the offer is not accepted by the seller, the deposit will be returned to you, unless you decide to make a new, higher, offer. If your offer is accepted, you will be expected to go through with the purchase and will usually lose the deposit if you try to back out.

Despite what anyone else may tell you, unless the offer form explicitly states otherwise, it is a binding contract once the seller accepts it, and its provisions are important. While sellers and brokers will understandably want things to move as rapidly as possible, it is your attorney's job to make sure that your rights are protected. Sometimes that may require things to be slowed down. Since many people shop for homes on evenings and weekends, it is usually not convenient or possible to reach your attorney before signing. Here are some things to watch for:

- An offer to purchase should identify the property by street address and, if possible, by reference to the book and page number of Seller's deed. It should state the amount that you are giving as a deposit to bind the offer and the amount of the final purchase price.
- It should state the date on which the offer will expire and that the deposit will be returned if the offer is not accepted.
- Offer forms usually provide that the parties will later execute a Purchase and Sale agreement. Some refer to standard form agreements. You should add language stating that the Purchase and Sale agreement will be "on terms to be approved by buyer's attorney." This preserves your right to have your attorney review the agreement. The time by which the Purchase and Sale agreement will be signed should allow adequate time (at least five business days) for that review.
- Any provision stating the date of the closing should give you at least six weeks to obtain financing, unless you have been *pre-approved* for a loan, and allow the lender to process the papers and obtain a title search. Unless you have been pre-approved, a closing sooner than that is usually not realistic. The offer should contain a statement somewhere that "time is of the essence."
- There should be a provision, either on the offer form or on a separate rider, that the purchase is subject to your obtaining adequate financing.
- There also should be a provision that the purchase is subject to your obtaining a satisfactory home inspection from a qualified home inspector, as well as any separate inspections you may need for radon, termites, or other special problems. If small children (under age 6) will live in the home, and it was built before 1978, you should provide for a lead paint inspection unless the seller can provide you with a certificate that the property has been de-leaded.
- Any other important representations about the property should be included as a condition of the offer and not left for the Purchase and Sale agreement.

Here is a true story to illustrate why this is important. A condominium unit in Brookline did not come with parking. Overnight street parking is not allowed in Brookline. The seller claimed to have arranged rented parking in the neighborhood. Since the buyer could not see the rented parking

when he was shown the property, he put in the offer a statement that it was "contingent on the availability of parking as represented." When the buyer saw the parking space, it turned out to be too small for his car. Because he had included that language in his offer, he was able to get back his deposit when he withdrew his offer. If not for that language in the offer, he would have lost the deposit.

- If you are buying a condo, there should be a provision that the purchase is subject to your attorney's review of the condominium documents. The seller should agree to provide all necessary documents promptly.

It is important to make sure that you get a copy of the signed Offer, so that your attorney can compare its provisions to any proposed

Purchase and Sale Agreement

The next step will be to sign a completed Purchase and Sale agreement. This will take place after your lawyer and the seller's lawyer have negotiated its terms. It is more detailed than the accepted offer, and when it has been signed by all parties, it replaces the accepted offer as the contract between the parties. Because of that, any conditions that you included in the offer need to be included in the P&S Agreement, unless they refer to events such as inspections that have already taken place. It is important to have your own lawyer at this stage to see that the terms of the agreement protect your interest. The "P&S Agreement" will probably be signed in multiple copies. Your mortgage lender will want to see a copy as soon as possible. With the signing of an agreement, you will be expected to put down additional money. The deposits are usually held by either the listing broker or the seller's attorney.

If you don't go through with the sale, you may lose this deposit. The Purchase and Sale agreement will generally contain contingency clauses for mortgage financing and for any inspections that have not yet taken place. You should not lose your deposit if you back out of the sale in accordance with these clauses. You also should not lose your deposit if the sale cannot take place because a title examination has disclosed problems with the seller's title.

Buying Rental Property

If you are buying a property which includes one or more rental apartments, there are a number of additional considerations. The Purchase and Sale Agreement should have a list of tenants, how much each pays in rent, what security and last month's rent deposits are being held for each, and the expiration date of each tenant's lease. It should provide that the seller will transfer the deposits to you at the closing. It should recite what appliances, such as stoves, dishwashers, air conditioners, and refrigerators, in each apartment are the property of the seller and are part of the sale. You should be shown copies of any leases, and the P&S Agreement should provide that no leases are to be renewed or new leases executed without your approval. If possible your lawyer should ask the seller to obtain an "estoppel certificate" from each tenant. That is a letter, signed by the tenant, reciting the state of the deposits for that tenant. That prevents the tenant from later claiming that there was a deposit that was not disclosed to you.

You should make sure that the home inspection includes a check for whether each tenant's gas and electrical meters serve only their apartments or whether any common areas are on a tenant's meter. Since by state law, tenants can only be required to pay for utilities for their own apartments, you should arrange to have any cross-metering fixed promptly, or you could be responsible for paying for the tenant's utilities. Two- and three-family houses often have hall and cellar lights metered to the first-floor apartment. If there are tenants in the first-floor apartment, you may be held responsible for their electric bills unless this is fixed. The best solution is a "public" or "common" meter, which serves only the common areas. The property you are buying is very likely to have this problem if it lacks a common-area meter.

Buying a Condominium Unit

When you buy a condominium unit, you own your unit as well as a percentage interest in the total building or complex, which is roughly proportional to the size of your unit and its amenities. That percentage interest is specified in the Master Deed for the condominium. Usually it is also specified in your unit deed. The condominium is governed by a Board of Trustees elected by the unit owners. You will pay a monthly condo fee set by the Trustees, usually annually. You may also have to pay special assessments, also set by the Trustees, to cover emergency expenses, unforeseen increases in costs, and the like. There should be an Annual Meeting of the unit owners and an annual budget. Before finally committing yourself to buy, you should ask to see a copy of the budgets for the current and previous year and ask about any special assessments which have been levied or which are contemplated. At the closing, the seller should provide a "6(d)" certificate, signed by one or more Trustees, certifying to any unpaid condo fees and assessments.

Condominium associations vary in size and internal politics. Understand that you are going to share ownership of the building with others. Try to meet some neighboring owners and get some sense of the political landscape. In a two-unit building, there could be deadlock if both parties own the same percentage interest in the building. In a three-unit building, you run the risk of being outvoted by the other two on important issues. In a large condominium, the Trustees may be capable and conscientious or entrenched and dictatorial. In elections for public office, a candidate is usually elected by a majority of those voting, no matter how low the turnout. But it usually requires a majority in interest of all unit owners to elect a Trustee. As a result it can be very difficult to dislodge incumbent Trustees.

Lead Paint

If the property was built before 1978, you should be given a seller disclosure of potential lead-based paint hazards, including an informational pamphlet from the U.S. Environmental Protection Agency. You must sign off on having received these disclosures. You need to pay attention to the notices which you will receive concerning lead paint. Especially if you are buying rental property, you should factor into your costs the probable cost of de-leading apartments. For more information, contact the Childhood Lead Poisoning Prevention Program at 617.284.8400 or 1.800.532.9571.

Inspections

Until recently, anyone could go into business as a home inspector, with no qualifications or licensing requirements. A new licensing law took effect in Massachusetts on 1 May 2001. It allows an automatic license to anyone who had been working as a home inspector for three years and has inspected 125 homes. You should be carefully check out anyone you hire as a home inspector. There are now a number of resources available for this purpose on the Web, and we have links to some of them on our website. Frequently there are several inspections, a general home inspector, a termite inspector, a radon inspector, and possibly others.

This office is sometimes able to refer clients to home inspectors with whom other clients have reported good results. We do this as a courtesy, without charge, and not as part of the legal services that we render. We cannot assume any responsibility for the quality of the home inspectors, and you are under no obligation to go to them. We are interested in hearing about your experiences with home inspectors so that we may better serve our clients in the future.

The Mortgage

The mortgage market is constantly changing, and there is no way that we can give information here that is both comprehensive and up-to-date. But here are some things that you need to know very early in the process:

- Lenders often will tell you that you can be pre-qualified for a mortgage before you begin searching for a home. This has the advantage that you know how high a price you can pay. It also is supposed to give you some assurance that your mortgage will be approved. This can shorten the time you will need after acceptance of the offer to arrange financing. However, there is a difference between being *pre-approved* and *pre-qualified*. *Pre-approved* means that a lending institution has decided that it will lend you up to a certain amount of money on an appropriate property. *Pre-qualified* does not carry that commitment. However some lenders use the terms interchangeably. You need to make sure that you know, preferably in writing, what your lender means by its terminology or you may be turned down for a mortgage that you thought was assured.
- Mortgage rates change frequently. Make sure you understand what the lender requires you to do in order to lock in the rate. If you discover at the closing that the rate is higher than you expected, it may be too late to do anything about it.
- Make sure you get a photocopy of your completed loan application. You will likely be asked to sign a re-typed copy of your application at the closing. Sometimes there are serious discrepancies between the re-typed version and your original application. Bring a copy of your original application with you to the closing, so that you can find and correct any errors.

- The lending institution is required to give you a good-faith estimate of closing costs. You should ask about any items in this estimate that you don't understand. Do not be surprised if some of the costs in this good-faith estimate" change by the time you get to the closing.
- Lending institutions often order an appraisal of the property. If they find an appraised value significantly less than your purchase price, they may not be willing to grant financing for your purchase. In that case, you may be able to renegotiate the sale with the seller. If the seller will not negotiate a lower sale price, you may not be able to go through with the purchase.
- Recent years have seen the proliferation of mortgage companies and mortgage brokers. Some are reputable and competent, others are not. Lately, we have seen a number of instances where these lenders have not been ready to close the sale on schedule. Depending on the market, this can cause you to lose the property and your deposit. It can also delay your moving date beyond the time when you must be out of your previous home. It is important to check the reputation of mortgage lenders and try to do business with those with a record of past performance that you can verify through friends, government agencies, or the Better Business Bureau. And don't neglect banks. They are subject to closer regulation than other institutions, and they have competitive interest rates. Even if you have credit problems, some small banks are willing to offer unconventional financing.

Walk-Through

The Purchase and Sale agreement often provides for a walk-through of the property on the morning of the closing. The purpose of the walk-through is to verify that the property is now in essentially the same condition as it was when you agreed to buy it. It is usually arranged through the broker.

Foreclosed Properties and Short Sales

In the current economy, it is not unusual to see foreclosed properties and short sales. They have special pitfalls. It is very risky to buy a property at the foreclosure auction. Usually you cannot see the condition of the property, and you cannot get out of the purchase if you can't find financing or if the title turns out to have problems or for any other reason. Less risky is buying a property from a financial institution that has bought it at the foreclosure. It is particularly important to have the property inspected because the property may have been vandalized by the former owner or by others during the months that the property stood vacant. Financial institutions often use P&S Agreements which are more favorable to them than is common with normal transactions, and they resist changes. A short sale is when, due to market conditions, the seller has to sell the property for less than the seller owes on the mortgage. This requires the seller to make some deal with his or her lender. The major difficulty with a short sale is that this process can take many months, with no guarantee that the lender will ever agree. You could wait all that time and then lose the home

in the end. The only good news is that you should get your deposit back if the sale falls through for this reason.

The Closing

The Purchase and Sale Agreement will specify a date on which the title transfer will take place. By that day, the financing and other contingencies should have been satisfied and the title examination completed. At the closing, the money is transferred, the paperwork of the sale is completed, and you receive the keys to the property. You will need to bring with you a driver's license or other photo ID, so that the lender's counsel can be assured that you are who you say you are. This is also required in order to sign anything which needs to be notarized.

Here are some of the things that will happen at the closing:

- You and the seller must apportion responsibility for real estate taxes. If the timing of the closing is such that you will own the property for part of the time for which the seller has already paid taxes, you will reimburse the seller for a pro-rated portion of the taxes that the seller has paid. If you will pay taxes for part of the time that the seller owned the property, the seller will reimburse you.

Cities and towns in Massachusetts operate on a fiscal year that begins each year on the first of July. By law, they are required to send tax bills to the person who was the assessed owner as of first of January before the start of the fiscal year. That means that, depending on when your closing takes place, tax bills will continue to be sent to the previous owner, possibly for more than a year after the closing.

It is helpful if the seller agrees to send you the tax bills for the property so long as they continue to receive them, but there is no legal requirement that they do so. It is your responsibility to be aware of when tax bills come out and to see that they are paid on time. If your mortgage servicer is paying taxes, you should forward the tax bill to them. If you fail to do this, you will be charged interest for late payment of taxes. Some city and town tax collectors will send you a duplicate tax bill if you notify them of the purchase and ask them to do so.

- If the property has oil heat, there is usually an adjustment made, by which you pay the seller for the amount of oil in the tank. In order to do this, the seller will provide a reading of the tank and a recent oil bill. Another way this is done is for the seller to have the oil company top off the tank just before the closing and bring the bill to the closing. It is necessary to know the size of the tank to calculate this adjustment.
- If the property is a condominium unit, there will be an adjustment of condominium fees similar to the adjustment for taxes. If the property contains rental units, there may be an adjustment for rents. You may also

be asked to agree to forward to the seller any uncollected rents that should have been paid to him or her.

- There may be other adjustments, depending on the details of your agreement with the seller. The adjustments and closing costs are all compiled on a form promulgated by the U.S. Department of Housing and Urban Development, and it is calculated how much money will be paid by who and to whom.
- The seller should bring to the closing all keys to all locks on the premises, all garage-door openers, and similar equipment. Make sure that you ask whether you have all keys before you leave the closing. You may also want to ask about warranties and instruction books on any appliances which are part of the sale.
- In the shuffle of all the documents of a modern closing, the deed seems almost an afterthought. Often the deed will have been signed by the seller before the closing. When you specify how you wish to take title, the necessary language will be filled in, and the lender's attorney will record it. You may receive it back in the mail several weeks to several months later.
- The mortgage consists of two basic documents: The first is a promissory note, by which you promise to pay a particular sum of money within a certain time. The second is a mortgage deed, by which you sign over to the lender certain rights to the property that you are buying, as security for the loan. This is usually a very long document, consisting of many pages of fine print. It often includes several riders which are signed separately, for such things as condominium units, variable rate mortgages, and other special purposes. Your attorney should explain to you each document as you sign it.
- One of the closing costs which you will be asked to pay may be for lender's title insurance, which protects the lender from defects in the title which may have been missed or may not appear on the record. This first became common in condominium purchases, but is now seen in all kinds of purchases. You have the opportunity at this time, for a small additional amount of money, to purchase owner's title insurance, which will protect you as owner against any unexpected defect in the title. The amount of protection that this insurance provides, and its low one-time cost, make it well worth the price. If no one mentions this to you, you should inquire about it.
- Your attorney may be able to obtain final closing figures from the lender's attorney a day or so before the closing, but this has become difficult in recent years. The most important number is the total amount of money that you have to bring with you to the closing. You should bring it in one or more certified or bank checks, payable to yourself. This makes it possible for you to indorse the checks over in whatever way the lender's counsel asks. You should also be prepared to write personal checks for up to

another \$1000, in case anything else comes up at the closing that wasn't anticipated earlier.

First-time buyers are often shocked at some of the items listed as closing costs. In general, you can expect to be required to pay for the costs of the lender's appraisal, a plot plan, the title examination, the lender's attorney's fees, and a host of other items which always seems to grow with each closing.

- Usually, the closing takes place at the office of the attorney for the mortgage lender. Other times it may take place at the office of the lender itself or at the Registry of Deeds. The deed will be recorded at the Registry of Deeds, either the same day or on the next business day after the closing. Before the deed and other documents are recorded, the records in the Registry of Deeds are checked up to the moment, in order to be certain that nothing has happened since the title search to impair the title you (and the lender) are receiving. The sale proceeds are disbursed to the seller after the recording. Some sellers will not allow you to move into the property until the closing has gone to record.

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